COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

NO. 05-81-00099-CR

CLYDE ALTON BANKSTON, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

FROM A DISTRICT COURT OF GRAYSON COUNTY, TEXAS

BEFORE JUSTICES ROBERTSON, STEPHENS AND ALLEN
OPINION PER CURIAM
DECEMBER 29, 1981

Clyde Alton Bankston was convicted of sexual abuse of a child and was sentenced by a jury to confinement for eight (8) years. On appeal he raises the following grounds of error: (1) the unconstitutionality of TEX. PENAL CODE ANN. § 21.10 (Vernon 1974); (2) no evidence of corroboration and insufficient evidence that complainant informed a third party of the offense within six months thereafter; (3) admission of an entire police report into evidence; (4) failure to instruct the jury on delivery of constitutional warnings and on circumstantial evidence; (5) failure to suppress application for probation; (6) failure to suppress a sheriff's posse badge; (7) quashing appellant's subpoenas of jury members; (8) failure to suppress alleged statements of confession; (9) refusal to grant new trial upon State's failure to produce criminal records

of State's witnesses; and (10) failure to grant a new trial upon grounds previously stated. We disagree with each contention and, thus, affirm.

The complainant in this case was a 15-year-old female. She testified that she became lost while driving from Denison to her home in Sherman. Appellant signaled to her to pull off the road, approached her vehicle, implied that he was a police officer, displayed a badge, and threatened to take her to the courthouse for DWI. Because of her belief that appellant was a police officer, she allowed him to get into her car, and shortly thereafter, the incident of which she complains occurred. During trial, she repeatedly testified that she had consumed only one beer on the evening in question and was not intoxicated. Appellant maintained that complainant had requested his assistance in driving home because she was lost and had been drinking. He denied that he had represented himself as a police officer or engaged in any sexual activities with the complainant.

In his first ground of error, appellant asserts that TEX. PENAL CODE ANN. § 21.10 (Vernon 1974) is unconstitutional in that it provides an absolute defense to prosecution in section (b) without a companion provision for defense witness immunity. Appellant contends this omission runs afoul of the sixth amendment and the due process clause of the fourteenth amendment to the United States Constitution as well as article I, sections 10 and 19 of the Texas Constitution. Appellant failed to show the existence of a witness who would testify in his behalf if immunity from prosecution were granted. Consequently, he has no standing to

assert that the statute is unconstitutional as to him in this situation. See Parent v. State, 621 S.W.2d 798 (Tex. Crim. App. 1981). This ground of error is overruled.

In his second ground of error, appellant contends that the trial court erred in refusing to grant his motion for instructed verdict of acquittal based on the State's failure to prove that complainant informed a third party of the offense within six months after its commission or to corroborate the complainant's testimony. Corroboration is not required provided the victim informs any person within six months after the offense is alleged to have occurred. TEX. CODE CRIM. PRO. ANN. art 38.07 (Vernon 1979). The record reflects that the complainant appeared before the Grayson County Grand Jury approximately one month after the date of the offense. The resulting indictment charging appellant with sexual abuse of a child was admitted into evidence at trial, and is sufficient to show that complainant informed someone, other than the defendant, of the alleged offense within six months following its occurrence. Therefore, we need not consider whether complainant's testimony was corroborated. Appellant's second ground of error is overruled.

In his third ground of error, appellant contends that the trial court erred in admitting into evidence an entire police report over his objection. Captain Shearer, a Denison police officer who was deceased at the time of trial, filed a written report of the incident as it was related to him by complainant and her mother about an hour and a half after the incident occurred. At trial, counsel for appellant called Lt. Nave, the

arresting officer, to authenticate the report prepared by Captain Shearer. He then introduced into evidence without objection, only the cover page of the report containing the complainant's name, address, age, and like information, and a concluding observation that complainant "had been drinking alcoholic beverages and appeared intoxicated to some degree." Appellant maintains that this portion of the report was introduced to controvert the statements of the complainant that she had consumed only one beer on the night of the offense.

On cross-examination, the State introduced the remainder of the report to corroborate and rehabilitate the complainant by showing the consistent portions of her statement. Appellant's counsel objected on the basis that the remainder of the report was hearsay, would constitute improper bolstering of the complainant, was inflammatory and prejudicial, and did not constitute an explanation of any act. The objection was overruled, as was appellant's motion for mistrial, and the entire report was admitted into evidence. Appellant urges this was reversible error.

Under TEX. CODE CRIM. PRO. ANN. 38.24 (Vernon 1979), the State was entitled to introduce any portion of the report on the same subject or any part which would explain or clarify the matter introduced by appellant. A general objection to the introduction of the remainder of the report in its entirety was insufficient to preserve any error for our review. Winters v. State, 616 S.W.2d 197 (Tex. Crim. App. 1981). Appellant's third ground of error is overruled.

In his fourth ground of error, appellant argues that the trial court erred in refusing his request to instruct the jury in accordance with TEX. CODE CRIM. PRO. ANN. art. 38.23 (Vernon 1979). Additionally, he asserts that the trial court should have instructed the jury on circumstantial evidence in regard to alleged statements of confession. The arresting officer testified at trial as to statements made by appellant immediately subsequent to arrest such as, "Well, Clyde, it looks like I'm in a lot of trouble;" "I don't know why I did this. She was so pretty and my wife has been out of town;" "I'm guilty of this. If you will just help me get out of it, it will never happen again. I don't know why I did it." These statements were not in response to any questions posed by the arresting officer and were made while appellant was "visibly upset." He had been warned of his rights and he made the comments freely and voluntarily. These statements were admissible as part of the res gestae of the arrest. Nastu v. State, 589 S.W.2d 434 (Tex. Crim. App. 1979); Hill v. State, 518 S.W.2d 810 (Tex. Crim. App. 1975). The rule of res gestae is independent of, superior to, and not limited by the rules relating to the use of confessions or admissions after arrest. Hill v. State, supra; Miles v. State, 488 S.W.2d 790 (Tex. Crim. App. 1972). Consequently, appellant's requested instructions were properly refused. His fourth ground of error is overruled.

In appellant's fifth ground of error, he complains that the trial court erred in failing to grant his motion to suppress the application for probation filed prior to trial as required by TEX. CODE CRIM. PRO. ANN. art. 42.12 (Vernon 1979) and in failing to grant his motion for mistrial after the prosecutor made reference to the application during voir dire.. Appellant's argument is that a prospective juror would necessarily interpret the filing of an application for probation prior to trial as an admission of guilt by the defendant. The record reflects that during voir dire examination by the State, the prosecutor stated, "Now, in this particular case the defendant has filed an application for probation. The law requires this before a trial." He then discussed probation generally and questioned the jury panel in the same general vein.

When the accused requests that the jury assess punishment and files an application for probation, the range of punishment includes probation. Reeves v. State, 491 S.W.2d 157 (Tex. Crim. App. 1973). In Reeves v. State, supra, the court held it was not error for the prosecutor to inform the jury panel during voir dire examination that the accused had filed an application for probation since it is permissible to question the panel to ascertain prejudice or objections to assessing the range of punishment. See White v. State, 478 S.W.2d 506 (Tex. Crim. App. 1972). Finding no error, we overrule appellant's fifth ground of error.

In his sixth ground of error, appellant contends the trial court erred in denying his motion to suppress the introduction of a sheriff's posse badge and, further, by admitting the badge over his timely objection. Specifically, appellant asserts that the badge was not relevant to any issue in the case and was evidence of an extraneous offense, namely, impersonation of a police officer. In his brief, appellant acknowledges the rule in criminal cases that the accused can be convicted, if at all, only by evidence showing he is guilty of the offense charged. Owens v. State, 450 S.W.2d 324, 325 (Tex. Crim. App. 1969). Complainant testified that a badge was used in the commission of the crime and, following appellant's arrest, a badge was discovered concealed in his boot. There was testimony describing the badge. Clearly, the article itself was admissible since it was involved in the commission of the offense charged. See Lyles v. State, 171 Tex. Crim. R. 468, 351 S.W.2d 886 (1961); Garcia v. State, 170 Tex. Cr. R. 328, 340 S.W.2d 803 (1960); Griffin v. State, 159 Tex. Crim. R. 142, 261 S.W.2d 838 (1953). Appellant's sixth ground of error is overruled.

In his seventh ground of error appellant contends the trial court erred in granting the State's motion to quash his subpoena of each jury member. Counsel for appellant sought to confirm information received subsequent to trial that jury misconduct had occurred during deliberations at the punishment phase. He was unable to obtain an affidavit of a juror or someone in a position to know of misconduct in support of his motion for new trial. Since he failed to provide a voluntary affidavit, as

required by art. 40.03 of the TEXAS CODE OF CRIMINAL PROCEDURE (Vernon 1979), the trial court correctly granted the State's motion to quash his subpoenas of the jury members. Ward v. State, 505 S.W.2d 832 (Tex. Crim. App. 1974); Mason v. State, 459 S.W.2d 855 (Tex. Crim. App. 1970). The seventh ground of error is overruled.

In his eighth ground of error, appellant argues that the trial court erred in failing to grant his motion to suppress statements made by him subsequent to arrest. According to appellant, these statements were in the nature of an oral confession which did not comply with art. 38.22, TEX. CODE CRIM. PRO. ANN. (Vernon 1979). We have previously determined that these statements were admissible as res gestae of the arrest. Appellant's eighth ground of error is overruled.

In his ninth ground of error, appellant contends that the trial court should have granted the motion for new trial based on the State's failure to supply the criminal record of a State's witness. The State did not discover until after trial that its witness, Michael Moravec, had pleaded guilty and been convicted of public intoxication two years prior to the commission of the crime here involved. He had no record of any felony convictions. Appellant asserts harmful error in that he was unable to use the criminal record for the purpose of cross-examination and impeachment of the witness. His argument is misplaced. In criminal cases, a witness may be impeached by showing that he has been finally convicted of a felony or a misdemeanor offense involving moral turpitude.. Bell v. State, 620 S.W.2d 116 (Tex. Crim. App. 1981). Public intoxication is a Class C

misdemeanor under the Texas Penal Code, section 42.08 (Vernon 1974), and is not an offense involving moral turpitude. Ruedas v. State, 143 Tex. Crim. R. 291, 158 S.W.2d 500 (1942). Hence, appellant could not have introduced proof of the witness's misdemeanor conviction for public intoxication. Bell v. State, supra. We overrule appellant's ninth ground of error.

Finally, appellant asserts that the trial court erred in refusing to grant his amended motion for new trial based upon the allegations contained in grounds of error 3, 4, 5, 6, and 8. As these contentions have been resolved against appellant, we find that the trial court did not abuse its discretion in overruling the motion for new trial.

Affirmed.

PER CURIAM

D.N.P.
Rule 207

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ALTON B. LYNCH
DISTRICT CLERK
GRAYSON COUNTY

NO. 10860

THE STATE OF TEXAS	§	IN THE 15 TH DISTRICT COURT
VS.	§	OF
CLYDE ALTON BANKSTON	§	GRAYSON COUNTY, TEXAS

JUDGMENT

BE IT REMEMBERED that on the 14th day of September, 19 79, this Cause being called for trial and the State appeared by her County Attorney and the Defendant, CLYDE ALTON BANKSTON, appeared in person, in open court, his counsel also being present, and the said Defendant, CLYDE ALTON BANKSTON, having been duly arraigned, and having pleaded not guilty to the indictment herein, both parties announced ready for trial, and thereupon a jury, to wit: JOE HAROLD CURETON and 11 others, was duly selected, impaneled and sworn, who having heard the indictment read and the Defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the court, retired in charge of the proper officer to consider of the verdict, and afterward were brought into court by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the court and is here now entered upon the minutes of the court, to wit:

"We, the jury, find the Defendant guilty of SEXUAL ABUSE OF A CHILD.

/s/ JOE HAROLD CURETON
FOREMAN OF THE JURY

THEREUPON, the Defendant elected to have his punishment assessed by the jury and such jury was called back into the box and heard evidence relative to the question of punishment, and thereafter they retired to consider such question and after having deliberated, they returned into court the following verdict:

"We, the jury, having found the Defendant, CLYDE ALTON BANKSTON, guilty of the offense of SEXUAL ABUSE OF A CHILD as charged in the indictment, assess

his punishment at EIGHT (8) YEARS CONFINEMENT IN THE TEXAS DEPARTMENT OF CORRECTIONS.

/s/ JOE HAROLD CURETON
FOREMAN OF THE JURY

IT IS THEREFORE CONSIDERED and adjudged by the court that the Defendant, CLYDE ALTON BANGSTON, is guilty of the offense of SEXUAL ABUSE OF A CHILD as charged against him in the indictment, as found by the jury, and that his punishment has been set by confinement in the Texas Department of Corrections for EIGHT (8) YEARS.

; and that the said Defendant be remanded to jail to await further order of this court herein.

SIGNED AND ENTERED this 3rd day of October, 19 79.

JUDGE PRESIDING

THE STATE OF TEXAS
VS.
CLYDE ALTON BANKSTON

IN THE 15th DISTRICT COURT
OF
GRAYSON COUNTY, TEXAS

SENTENCE

This day this cause being again called, the State appeared by her County Attorney and the Defendant, CLYDE ALTON BANKSTON, appeared in open Court in person and with his counsel present for the purpose of having the sentence of law pronounced in accordance with the Judgment herein rendered and entered against him on a former day of this term. And thereupon the defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of the said Defendant to pronounce sentence against him as follows: It is the Order of this Court that the Defendant, CLYDE ALTON BANKSTON, who has been adjudged to be guilty of SEXUAL ABUSE OF A CHILD, and whose punishment has been assessed by the Jury at confinement in the Texas Department of Corrections for EIGHT years, be delivered by the Sheriff of Grayson County, Texas to the Department of Corrections of the State of Texas or other persons legally authorized to received such convicts, and the said CLYDE ALTON BANKSTON shall be confined in the said Department of Corrections for not less than 2 years and not more than EIGHT years in accordance with the provisions of the law governing the Department of Corrections of said State. The Sheriff shall deliver the said Defendant to the proper authorities within fourteen days from the pronouncement of sentence, and the Defendant is remanded to jail until the said Sheriff can obey the directions of this sentence. The sentence shall commence on the 12th day of October, 1979.

Signed this the 12th day of October, 1979

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DIS... ...
GRAYSON COUNTY

R. Vaughan
JUDGE PRESIDING

Original—White; Defendant's Copy—Pink; State's Copy—Yellow

(18)

Court of Appeals

Fifth Supreme Judicial District of Texas

Dallas County Courthouse
Dallas, Texas 75202

JEANNETTE JOHNSON, CLERK
214/749-8385

CHIEF JUSTICE
CLARENCE A. GUITTARD

JUSTICES
TED M. ATKIN
TED D. ROBERTSON
SPENCER CARVER
CHARLES H. STOREY
BILL J. STEPHENS
JOHN SPARLING
JOHN C. VANCE
JOE FISH
JAMES D. ALLEN
HARRIET WHITMAN
PATRICK D. GUILLOT

Date: May 6, 1982

Honorable Stephen F. Hefner

109 W. Houston

Sherman, TX 75090

You are hereby notified that, in the case of:

CLYVE ALTON BANKSTON, Appellant vs.

THE STATE OF TEXAS, Appellee, our NO. 05-81-00099-CR

the following decision and order was this day made and entered by the Court:

Motion FOR STAY OF MANDATE

DENIED.

Respectfully yours,

JEANNETTE JOHNSON, CLERK
COURT OF APPEALS, FIFTH
SUPREME JUDICIAL DISTRICT
OF TEXAS, DALLAS, TEXAS.

By Joyce Sanders
Deputy

COURT OF CRIMINAL APPEALS

OF TEXAS

NUMBER 127-82

CLYDE ALTON BANKSTON

VS.

IN THE 5th COURT OF APPEALS

THE STATE OF TEXAS

COURT OF APPEALS NO. 05-81-00099-CR

ORDER

The appellant's petition for discretionary review in the above numbered and entitled cause is refused.

PER CURIAM

A TRUE COPY ATTEST:

TEXAS LOVE, CLERK
COURT OF CRIMINAL APPEALS

BY: Sherri Ericson

DEPUTY

D-1

END OF DOCKET